

Introduced by Senator Cox

January 12, 2010

An act to amend Section 20133 of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 879, as introduced, Cox. Construction projects: alternative bidding procedures: design-build.

Existing law authorizes counties to use alternative procedures, known as design-build, for bidding on construction projects in the county in excess of \$2,500,000, in accordance with specified procedures. Each county that elects to use the design-build method on a public works project is required to submit a report to the Legislative Analyst's Office before December 1, 2009, containing a description of each public works project procured through the design-build process and completed after November 1, 2004, and before November 1, 2009. Existing law also requires the Legislative Analyst, on or before January 1, 2010, to report to the Legislature on the use of the design-build method by counties.

This bill would repeal those reporting provisions.

Existing law authorizing design-build contracts for county construction projects is effective only until January 1, 2011, and as of that date is repealed.

This bill would delete that repeal date, thereby making the county design-build provisions operative indefinitely.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 20133 of the Public Contract Code is amended to read:

20133. (a) A county, with approval of the board of supervisors, may utilize an alternative procedure for bidding on construction projects in the county in excess of two million five hundred thousand dollars (\$2,500,000) and may award the project using either the lowest responsible bidder or by best value.

(b) (1) It is the intent of the Legislature to enable counties to utilize design-build for buildings and county sanitation wastewater treatment facilities. It is not the intent of the Legislature to authorize this procedure for other infrastructure, including, but not limited to, streets and highways, public rail transit, or water resources facilities and infrastructures.

(2) The Legislature also finds and declares that utilizing a design-build contract requires a clear understanding of the roles and responsibilities of each participant in the design-build process.

(3) (A) For contracts awarded prior to either the effective date of regulations adopted by the Department of Industrial Relations pursuant to subdivision (b) of Section 1771.55 of the Labor Code or the fees established by the department pursuant to subparagraph (B), if the board of supervisors elects to proceed under this section, the board of supervisors shall establish and enforce for design-build projects a labor compliance program containing the requirements outlined in Section 1771.5 of the Labor Code, or it shall contract with a third party to operate a labor compliance program containing the requirements outlined in Section 1771.5 of the Labor Code. This requirement shall not apply to any project where the county or the design-build entity has entered into any collective bargaining agreement or agreements that bind all of the contractors performing work on the projects.

(B) For contracts awarded on or after both the effective date of regulations adopted by the Department of Industrial Relations pursuant to subdivision (b) of Section 1771.55 of the Labor Code and the fees established by the department pursuant to this subparagraph, the board of supervisors shall pay a fee to the department, in an amount that the department shall establish, and as it may from time to time amend, sufficient to support the department's costs in ensuring compliance with and enforcing

1 prevailing wage requirements on the project, and labor compliance
2 enforcement as set forth in subdivision (b) of Section 1771.55. All
3 fees collected pursuant to this paragraph shall be deposited in the
4 State Public Works Enforcement Fund created by Section 1771.3
5 of the Labor Code, and shall be used only for enforcement of
6 prevailing wages requirements on those projects.

7 (C) The Department of Industrial Relations may waive the fee
8 set forth in subparagraph (B) if the board of supervisors has
9 previously been granted approval by the director to initiate and
10 operate a labor compliance program on its projects and requests
11 to continue to operate that labor compliance program on its projects
12 in lieu of labor compliance by the department pursuant to
13 subdivision (b) of Section 1771.55. The fee shall not be waived
14 for the board of supervisors if it contracts with a third party to
15 initiate and enforce labor compliance programs on its projects.

16 (c) As used in this section:

17 (1) “Best value” means a value determined by objective criteria
18 related to price, features, functions, and life-cycle costs.

19 (2) “Design-build” means a procurement process in which both
20 the design and construction of a project are procured from a single
21 entity.

22 (3) “Design-build entity” means a partnership, corporation, or
23 other legal entity that is able to provide appropriately licensed
24 contracting, architectural, and engineering services as needed
25 pursuant to a design-build contract.

26 (4) “Project” means the construction of a building and
27 improvements directly related to the construction of a building,
28 and county sanitation wastewater treatment facilities, but does not
29 include the construction of other infrastructure, including, but not
30 limited to, streets and highways, public rail transit, or water
31 resources facilities and infrastructure.

32 (d) Design-build projects shall progress in a four-step process,
33 as follows:

34 (1) (A) The county shall prepare a set of documents setting
35 forth the scope of the project. The documents may include, but are
36 not limited to, the size, type, and desired design character of the
37 public improvement, performance specifications covering the
38 quality of materials, equipment, and workmanship, preliminary
39 plans or building layouts, or any other information deemed
40 necessary to describe adequately the county’s needs. The

1 performance specifications and any plans shall be prepared by a
2 design professional who is duly licensed and registered in
3 California.

4 (B) Any architect or engineer retained by the county to assist
5 in the development of the project specific documents shall not be
6 eligible to participate in the preparation of a bid with any
7 design-build entity for that project.

8 (2) (A) Based on the documents prepared in paragraph (1), the
9 county shall prepare a request for proposals that invites interested
10 parties to submit competitive sealed proposals in the manner
11 prescribed by the county. The request for proposals shall include,
12 but is not limited to, the following elements:

13 (i) Identification of the basic scope and needs of the project or
14 contract, the expected cost range, and other information deemed
15 necessary by the county to inform interested parties of the
16 contracting opportunity, to include the methodology that will be
17 used by the county to evaluate proposals and specifically if the
18 contract will be awarded to the lowest responsible bidder.

19 (ii) Significant factors that the county reasonably expects to
20 consider in evaluating proposals, including cost or price and all
21 nonprice related factors.

22 (iii) The relative importance of weight assigned to each of the
23 factors identified in the request for proposals.

24 (B) With respect to clause (iii) of subparagraph (A), if a
25 nonweighted system is used, the agency shall specifically disclose
26 whether all evaluation factors other than cost or price when
27 combined are:

28 (i) Significantly more important than cost or price.

29 (ii) Approximately equal in importance to cost or price.

30 (iii) Significantly less important than cost or price.

31 (C) If the county chooses to reserve the right to hold discussions
32 or negotiations with responsive bidders, it shall so specify in the
33 request for proposal and shall publish separately or incorporate
34 into the request for proposal applicable rules and procedures to be
35 observed by the county to ensure that any discussions or
36 negotiations are conducted in good faith.

37 (3) (A) The county shall establish a procedure to prequalify
38 design-build entities using a standard questionnaire developed by
39 the county. In preparing the questionnaire, the county shall consult
40 with the construction industry, including representatives of the

1 building trades and surety industry. This questionnaire shall require
2 information including, but not limited to, all of the following:

3 (i) If the design-build entity is a partnership, limited partnership,
4 or other association, a listing of all of the partners, general partners,
5 or association members known at the time of bid submission who
6 will participate in the design-build contract, including, but not
7 limited to, mechanical subcontractors.

8 (ii) Evidence that the members of the design-build entity have
9 completed, or demonstrated the experience, competency, capability,
10 and capacity to complete, projects of similar size, scope, or
11 complexity, and that proposed key personnel have sufficient
12 experience and training to competently manage and complete the
13 design and construction of the project, as well as a financial
14 statement that assures the county that the design-build entity has
15 the capacity to complete the project.

16 (iii) The licenses, registration, and credentials required to design
17 and construct the project, including information on the revocation
18 or suspension of any license, credential, or registration.

19 (iv) Evidence that establishes that the design-build entity has
20 the capacity to obtain all required payment and performance
21 bonding, liability insurance, and errors and omissions insurance.

22 (v) Any prior serious or willful violation of the California
23 Occupational Safety and Health Act of 1973, contained in Part 1
24 (commencing with Section 6300) of Division 5 of the Labor Code,
25 or the federal Occupational Safety and Health Act of 1970 (P.L.
26 91-596), settled against any member of the design-build entity,
27 and information concerning workers' compensation experience
28 history and worker safety program.

29 (vi) Information concerning any debarment, disqualification,
30 or removal from a federal, state, or local government public works
31 project. Any instance in which an entity, its owners, officers, or
32 managing employees submitted a bid on a public works project
33 and were found to be nonresponsive, or were found by an awarding
34 body not to be a responsible bidder.

35 (vii) Any instance in which the entity, or its owners, officers,
36 or managing employees, defaulted on a construction contract.

37 (viii) Any violations of the Contractors' State License Law
38 (Chapter 9 (commencing with Section 7000) of Division 3 of the
39 Business and Professions Code), excluding alleged violations of
40 federal or state law including the payment of wages, benefits,

1 apprenticeship requirements, or personal income tax withholding,
2 or of Federal Insurance Contributions Act (FICA; 26 U.S.C. Sec.
3 3101 et seq.) withholding requirements settled against any member
4 of the design-build entity.

5 (ix) Information concerning the bankruptcy or receivership of
6 any member of the design-build entity, including information
7 concerning any work completed by a surety.

8 (x) Information concerning all settled adverse claims, disputes,
9 or lawsuits between the owner of a public works project and any
10 member of the design-build entity during the five years preceding
11 submission of a bid pursuant to this section, in which the claim,
12 settlement, or judgment exceeds fifty thousand dollars (\$50,000).
13 Information shall also be provided concerning any work completed
14 by a surety during this period.

15 (xi) In the case of a partnership or other association, that is not
16 a legal entity, a copy of the agreement creating the partnership or
17 association and specifying that all partners or association members
18 agree to be fully liable for the performance under the design-build
19 contract.

20 (B) The information required pursuant to this subdivision shall
21 be verified under oath by the entity and its members in the manner
22 in which civil pleadings in civil actions are verified. Information
23 that is not a public record pursuant to the California Public Records
24 Act (Chapter 3.5 (commencing with Section 6250) of Division 7
25 of Title 1 of the Government Code) shall not be open to public
26 inspection.

27 (4) The county shall establish a procedure for final selection of
28 the design-build entity. Selection shall be based on either of the
29 following criteria:

30 (A) A competitive bidding process resulting in lump-sum bids
31 by the prequalified design-build entities. Awards shall be made to
32 the lowest responsible bidder.

33 (B) A county may use a design-build competition based upon
34 best value and other criteria set forth in paragraph (2). The
35 design-build competition shall include the following elements:

36 (i) Competitive proposals shall be evaluated by using only the
37 criteria and selection procedures specifically identified in the
38 request for proposal. However, the following minimum factors
39 shall each represent at least 10 percent of the total weight of
40 consideration given to all criteria factors: price, technical design,

1 and construction expertise, life cycle costs over 15 years or more,
2 skilled labor force availability, and acceptable safety record.

3 (ii) Once the evaluation is complete, the top three responsive
4 bidders shall be ranked sequentially from the most advantageous
5 to the least.

6 (iii) The award of the contract shall be made to the responsible
7 bidder whose proposal is determined, in writing, to be the most
8 advantageous.

9 (iv) Notwithstanding any provision of this code, upon issuance
10 of a contract award, the county shall publicly announce its award,
11 identifying the contractor to whom the award is made, along with
12 a written decision supporting its contract award and stating the
13 basis of the award. The notice of award shall also include the
14 county's second and third ranked design-build entities.

15 (v) For purposes of this paragraph, "skilled labor force
16 availability" shall be determined by the existence of an agreement
17 with a registered apprenticeship program, approved by the
18 California Apprenticeship Council, which has graduated
19 apprentices in each of the preceding five years. This graduation
20 requirement shall not apply to programs providing apprenticeship
21 training for any craft that has been deemed by the Department of
22 Labor and the Department of Industrial Relations to be an
23 apprenticeable craft in the five years prior to enactment of this act.

24 (vi) For purposes of this paragraph, a bidder's "safety record"
25 shall be deemed "acceptable" if their experience modification rate
26 for the most recent three-year period is an average of 1.00 or less,
27 and their average total recordable injury/illness rate and average
28 lost work rate for the most recent three-year period does not exceed
29 the applicable statistical standards for its business category or if
30 the bidder is a party to an alternative dispute resolution system as
31 provided for in Section 3201.5 of the Labor Code.

32 (e) (1) Any design-build entity that is selected to design and
33 build a project pursuant to this section shall possess or obtain
34 sufficient bonding to cover the contract amount for nondesign
35 services, and errors and omission insurance coverage sufficient to
36 cover all design and architectural services provided in the contract.
37 This section does not prohibit a general or engineering contractor
38 from being designated the lead entity on a design-build entity for
39 the purposes of purchasing necessary bonding to cover the activities
40 of the design-build entity.

(2) Any payment or performance bond written for the purposes of this section shall be written using a bond form developed by the county.

(f) All subcontractors that were not listed by the design-build entity in accordance with clause (i) of subparagraph (A) of paragraph (3) of subdivision (d) shall be awarded by the design-build entity in accordance with the design-build process set forth by the county in the design-build package. All subcontractors bidding on contracts pursuant to this section shall be afforded the protections contained in Chapter 4 (commencing with Section 4100) of Part 1. The design-build entity shall do both of the following:

(1) Provide public notice of the availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process of the county.

(2) Provide a fixed date and time on which the subcontracted work will be awarded in accordance with the procedure established pursuant to this section.

(g) The minimum performance criteria and design standards established pursuant to paragraph (1) of subdivision (d) shall be adhered to by the design-build entity. Any deviations from those standards may only be allowed by written consent of the county.

(h) The county may retain the services of a design professional or construction project manager, or both, throughout the course of the project in order to ensure compliance with this section.

(i) Contracts awarded pursuant to this section shall be valid until the project is completed.

(j) Nothing in this section is intended to affect, expand, alter, or limit any rights or remedies otherwise available at law.

(k) (1) If the county elects to award a project pursuant to this section, retention proceeds withheld by the county from the design-build entity shall not exceed 5 percent if a performance and payment bond, issued by an admitted surety insurer, is required in the solicitation of bids.

(2) In a contract between the design-build entity and the subcontractor, and in a contract between a subcontractor and any subcontractor thereunder, the percentage of the retention proceeds withheld may not exceed the percentage specified in the contract between the county and the design-build entity. If the design-build entity provides written notice to any subcontractor who is not a

1 member of the design-build entity, prior to or at the time the bid
2 is requested, that a bond may be required and the subcontractor
3 subsequently is unable or refuses to furnish a bond to the
4 design-build entity, then the design-build entity may withhold
5 retention proceeds in excess of the percentage specified in the
6 contract between the county and the design-build entity from any
7 payment made by the design-build entity to the subcontractor.

8 ~~(f) Each county that elects to proceed under this section and~~
9 ~~uses the design-build method on a public works project shall submit~~
10 ~~to the Legislative Analyst's Office before December 1, 2009, a~~
11 ~~report containing a description of each public works project~~
12 ~~procured through the design-build process and completed after~~
13 ~~November 1, 2004, and before November 1, 2009. The report shall~~
14 ~~include, but shall not be limited to, all of the following information:~~

- 15 ~~(1) The type of project.~~
- 16 ~~(2) The gross square footage of the project.~~
- 17 ~~(3) The design-build entity that was awarded the project.~~
- 18 ~~(4) The estimated and actual length of time to complete the~~
19 ~~project.~~
- 20 ~~(5) The estimated and actual project costs.~~
- 21 ~~(6) A description of any written protests concerning any aspect~~
22 ~~of the solicitation, bid, proposal, or award of the design-build~~
23 ~~project, including the resolution of the protests.~~
- 24 ~~(7) An assessment of the prequalification process and criteria.~~
- 25 ~~(8) An assessment of the effect of retaining 5-percent retention~~
26 ~~on the project.~~
- 27 ~~(9) A description of the Labor Force Compliance Program and~~
28 ~~an assessment of the project impact, where required.~~
- 29 ~~(10) A description of the method used to award the contract.~~
30 ~~If best value was the method, the report shall describe the factors~~
31 ~~used to evaluate the bid, including the weighting of each factor~~
32 ~~and an assessment of the effectiveness of the methodology.~~
- 33 ~~(11) An assessment of the project impact of "skilled labor force~~
34 ~~availability."~~
- 35 ~~(12) An assessment of the design-build dollar limits on county~~
36 ~~projects. This assessment shall include projects where the county~~
37 ~~wanted to use design-build and was precluded by the dollar~~
38 ~~limitation. This assessment shall also include projects where the~~
39 ~~best value method was not used due to dollar limitations.~~

1 ~~(13) An assessment of the most appropriate uses for the~~
2 ~~design-build approach.~~

3 ~~(m) Any county that elects to not use the authority granted by~~
4 ~~this section may submit a report to the Legislative Analyst's Office~~
5 ~~explaining why the county elected to not use the design-build~~
6 ~~method.~~

7 ~~(n) On or before January 1, 2010, the Legislative Analyst shall~~
8 ~~report to the Legislature on the use of the design-build method by~~
9 ~~counties pursuant to this section, including the information listed~~
10 ~~in subdivision (l). The report may include recommendations for~~
11 ~~modifying or extending this section.~~

12 ~~(o)~~

13 ~~(l) Except as provided in this section, nothing in this act shall~~
14 ~~be construed to affect the application of any other law.~~

15 ~~(p) This section shall remain in effect only until January 1,~~
16 ~~2011, and as of that date is repealed, unless a later enacted statute,~~
17 ~~that is enacted before January 1, 2011, deletes or extends that date.~~